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Legislative Responses to the Use of Non-Disclosure Agreement Regarding Workplace Sexual Misconduct Claims: From Information Transparency to Systematic Protection

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LEGISLATIVE RESPONSES TO THE USE OF NON-DISCLOSURE AGREEMENT REGARDING WORKPLACE SEXUAL MISCONDUCT CLAIMS: FROM INFORMATION TRANSPARENCY TO SYSTEMATIC PROTECTION

INTRODUCTION

Since late 2017, headline after headline has featured allegations of prominent figures' sexual misconduct and use of non-disclosure agreements (NDAs) against unprivileged women in settling sexual harassment cases.[1] The trigger for such public outcry is the discovery that movie mogul Harvey Weinstein used NDAs to prevent her former assistant, Zelda Perkins, in exchange of a settlement, from speaking out or sharing his sexual harassment behaviors against her with her friends, family or doctors who did not sign NDAs, and limit the scope of her disclosure in a criminal case brought against the producer.[2] #MeToo was used as a hashtag started by American actress Alyssa Milano who shared her story of sexual assault against Harvey Weinstein, and the #MeToo movement sparkled by the online revelations spread rapidly.[3] It opened the floodgates to a naming-and-shaming reckoning with the pervasive sex discrimination in the workplace, which solidified workplace sexual harassment as one of the biggest issues facing the public today.[4]

Part I of this essay explores the potential of addressing the issues of the workplace-sexual-misconduct-related settlement NDAs within the pre-existing legal frames before the #MeToo legislative wave, including state contract law and statutes (typically civil procedure rules) in regulating NDAs in employment contracts and settlements. Part I also recognizes the

[1] *See* Sarah Almukhtar, Michael Gold & Larry Buchanan, *After Weinstein: 71 Men Accused of Sexual Misconduct and Their Fall from Power*, N.Y. TIMES (Feb. 8, 2018), https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconductweinstein.html.
[2] *See* Stacy Perman, *#MeToo law restricts use of nondisclosure agreements in sexual misconduct cases*, L.A. TIMES (Dec. 30, 2018), https://www.latimes.com/business/hollywood/la-fi-ct-nda-hollywood-20181231-story.html.
[3] *See* Mary Pflum, *A year ago, Alyssa Milano started a conversation about #MeToo. These women replied*, NBC News (Oct. 15, 2018), https://www.nbcnews.com/news/us-news/year-ago-alyssa-milano-started-conversation-about-metoo-these-women-n920246.
[4] *See* Almukhtar, *supra* note 1.

limitations of solving the sexual-misconduct settlement NDAs in this way and justifies a call for new laws for such NDAs, as well as putting forward some suggestions for the state judicial systems.

Part II focuses on the legislative and regulatory responses at the federal and state level to the use of NDAs in the sexual harassment or misconduct claims and analyzes their potential impact on the employers, harassers, and employees (victims) and the strategies available to the victims. It also urges the federal and state legislators to move from an information transparency approach to a systematic protection approach.

Part III discusses policy and arguments behind different legislative responses to the NDAs. When public interest conflicts with individual justice, there is no uniform way to address it. State legislatures should consider new laws that accommodate the sexual harassment survivors' needs within the existing legal system. A consistent, flexible, and dynamic balanced state legal system is important to address the bias behind the use of NDAs in buying the silence of unprivileged women or marginalized groups. In addition to legislative efforts in federal and state employment discrimination and civil rights law, the existing mechanisms in other areas of law, such as tort law, tax law, securities law, and corporation law, and the alternative mechanisms from the society, should be fully explored. The essay ends by emphasizing the promise—as well as pitfalls—of using s balanced, systematic legal system as a catalyst for social changes.

I. A NONDISCLOSURE AGREEMENT AS A CONTRACT

NDAs, also called confidential provisions, are a common and important part of business contracts or settlement agreements to resolve a legal dispute.[5] An NDA, in exchange of consideration or another promise, is a legally enforceable promise to keep silence about agreed pieces of information.[6] NDAs aim to establish "a confidential relationship between a person who holds some kind of… secret and a person to whom the secret will be disclosed."[7] The general principles governing contract defenses, including unconscionability, duress, public policy, and so on, consequently, also apply to NDAs.[8] The freedom of contract is not absolute and may be modified by courts either because the contract lacks an essential element or in the name of public interest or public policy.[9]

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[5] *See* Ann Fromholz & Jeanette Laba, *#MeToo Challenges Confidentiality and Nondisclosure Agreements*, 41 L.A. LAW. 12, 12 (2018).

[6] *See* RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981) ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognize as a duty.")

[7] *NDA 101: What Is a Non-Disclosure Agreement?* ROCKET LAWYER, https://www.rocketlawyer.com/article/nda-101:-what-is-a-non-disclosure-agreement.rl?rlfr=srch:1:0&search_position=1&search_category=Answers&ampsearch_category_position=1&search_display=NDA+101%3A+What+Is+a+NonDisclosure+Agreement%3F&search_typed=NDA+101 (last visited May 12, 2019) (explaining that NDAs "serve as a safeguard for confidential information," "aid inventors with their patent rights," and "expressly outline and classify information that is exclusive and confidential from information that is not"); *see also* Taishi Duchicela, *Rethinking Nondisclosure Agreements in Sexual Misconduct Cases*, 20 LOY. J. PUB. INT. L. 54, 62 (2018).

[8] *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 174 (duress), 178 (public policy) & 208 (unconscionability) (1981); *see also* Vasundhara Prasad, *If Anyone Is Listening, #MeToo: Breaking the Culture of Silence around Sexual Abuse through Regulating Non-disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507, 2525-29 (2018) (explaining that, under the Restatement (Second) of Contracts, a court may find a contract unconscionable if the difference between parties with unequal bargaining power results in the weaker party's assuming more risks and having to accept the terms of a contract unreasonably favorable to the strong party; summarizing that a court may find the existence of duress if the weaker party has no other choices but to accepts the unfair terms when the stronger party makes a threat to get her consent; discussing that a contract is unenforceable as against public policy if "either existing legislation dictates that such an agreement is unenforceable or the parties' interest in its enforcement is plainly dwarfed by a public policy interest against the enforcement of the contract or a term").

[9] *See* Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A study in Modern Contract Theory*, 74 LOWA L. REV. 115, 115-17 (1988) (explaining that courts will view contracts as "void" if they are illegal or against public policies).

A. Can the Existing Contracts Law Resolve the Legal Disputes Arising from the Use of NDAs in the Sexual Harassment or Misconduct Claims?

In practice, NDAs are essential components of the employment contracts for corporate employers to cover trade secret and proprietary business information or, in the entertainment industry, to protect the privacy of public figures.[10] Applying contracts law to employment-related NDAs, consideration usually is not the issue. For NDAs in a pre-dispute employment contracts, the consideration can be the establishment of employment relationship or salary increase or benefit grant, while the consideration for NDAs in a post-dispute employment related settlement is often a separate lump sum of payment or a more generous severance package. The most disputed issues are the unbalanced bargain power of employers and employees and the one-sided provisions to prohibit only the complainants from disclosure, which may result in the finding of unconscionability, duress, or deviation from public policy.[11] Employees in bigger corporations tend to have disproportionately lower individual bargain power with their gigantic employer, compared with individual employers or small business owners; but employees of famous companies may be more likely to garner media and social attention as their leverage against employers' desire to preserve their good will. Although courts will not find unconscionability upon the appearance of inequality in bargain powers alone, it is an important influencing factor that may improve the employees' chance of a successful unconscionability or duress claim.[12]

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[10] *See* Steven I. Katz, Comment, *Unauthorized Biographies and Other "Books of Revelations": A Celebrity's Legal Recourse to a Truthful Public Discourse*, 36 UCLA L. REV. 815, 842-47 (1989) (finding that NDAs are commonly used to "[establish] eternal loyalties between a celebrity and his or her employee or intimate;" discussing the potential issues of NDAs on the grounds of public policy or freedom of expression).

[11] *See* RESTATEMENT, *supra* note 8; *see also* Nikki R. Breeland, *All the Truth I Could Tell: a Discussion of Title VII's Potential Impact on Systemic Entertainment Industry Victimization*, 25 UCLA WOMEN'S L.J. 135, 160, n. 127 (2018) (summarizing that some advantages of NDA clauses are "convenience, cohesion, simplicity, and a decrease in costs," while some disadvantages are "confusion, treatment by different jurisdictions, risk the NDA clause poses to the rest of the contract, and loss of the full NDA").

[12] *See* RESTATEMENT (SECOND) OF CONTRACTS §208 cmt. c. ("Inadequacy of consideration does not of itself invalidate a bargain, but gross disparity in the values exchanged may be an important factor in a determination that a contract is unconscionable and may be sufficient ground, without more, for denying specific performance.").

When it comes to the use of sexual-harassment NDAs, the inequality of the parties' power and the defects of the bargaining processes are acute issues.[13] If a company lacks or fails to enforce a reasonable workplace sexual harassment and discrimination policy and mechanism, not only will the victims' experience not be able to be acknowledged and compensated, but the victims will also face employment setbacks since harassers in most cases are supervisors of the victims[14] or a hostile work environment of being negatively critiqued by coworkers in a biased corporate culture.[15] The more egregious the sexual abuse and discrimination, the more hostile the work environment, the more serious the results of employer inaction, the more likely a court is to find an NDA unconscionable based on the overall disparity of bargain power accompanied with other circumstantial evidence of the defects in the bargaining process, and completely or partly refuse to enforce the contract.[16] If the employer or harasser threatens the victim' future employment opportunities or shame the victim in the workplace, and the victim can prove to the

[13] Cheryl Groucutt, Marek Vochozka, Pavol Kral & Wlodzimierz Sroka, *The #MeToo Social Media Campaign, Sexualized Forms of Male Control, and the Failure of Current Law of Curb Gendered Harassment and Misconduct in the Workplace*, 10 CONTEMP. READINGS L. & SOC. JUST. 85, 89, fig.5 (2018). The survey of 2,800 individuals conducted in November 2017 in Figure 5 shows that among the top risk factors for sexual violence (lack of institutional support for victims, adherence to traditional gender role norms in the workplace, lack of employment opportunities, weak sanctions against violence perpetrators, and weak policies related to sexual violence and gender equity), lack of institutional support for victims is the factor with the highest support rate (35%), and all the others gained around 25% votes. *Id.*

[14] *See* Mark Townsend, *Rose McGowan: "Hollywood Blacklisted Me Because I Got Raped"*, GUARDIAN (Oct. 14, 2017), https://www.theguardian.com/film/2017/oct/14/harvey-weinstein-rose-mcgowan-rape-film. Actress Rose McGowan says she was blacklisted after making internal complaints about her rape by Harvey Weistein. *Id.*; *see also* Madeleine Aggeler, *What Happened to the Women Louis C.K. Harassed?*, CUT (Aug. 30, 2018), https://www.thecut.com/2018/08/what-about-the-careers-of-louis-ck-victims.html (finding that when comedians Dana Min Goodman and Julia Wolov complained to others about the sexual harassment behaviors of Louis C.K., they felt backlash in the workplace).

[15] *See* Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time's up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 77-78 (2019) (finding that the survivors hesitated to claim compensation for sexual violence because of their fear to be looked as "ambulance chasers who were looking for a payday" or "gold diggers;" expecting the processes to "remedy the consequences of sexual assault to challenge the taint of monetary damages and stereotype of the gold digger" and "make sexual misconduct expensive for alleged abusers" to have a deterrence function).

[16] *See* RESTATEMENT (SECOND) OF CONTRACTS §208, cmt. b & c (1981) (" [A] bargain was said to be unconscionable in an action at law if it was "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other;" "[s]uch a disparity [(of bargaining power)] may also corroborate indications of defects in the bargaining process, or may affect the remedy to be granted when there is a violation of a more specific rule.").

court that she had no choice but to agree to the NDAs unfavorable to her in the settlements, the court may declare the contract void.[17]

Also, the recent revelations of workplace sexual harassment unleashed a wave of attention to the potential of misuse and abuse of NDAs in settlements, arguably contrary to public policy.[18] Such workplace-sexual-harassment NDAs may appear in pre-dispute employment contracts,[19] or post-dispute settlements.[20] In a settlement, for example, the NDA is frequently the material part of the contract, and it often prohibits the victim from disclosing to anyone else any details of the sexual misconduct that led up to the settlement or the settlement itself.[21] In a workplace with "a culture of sexual harassment," these NDAs are particularly toxic, "enabling the abusive behavior to continue unchecked."[22] Critics of NDAs and the typical accompanying mandatory arbitration clause often argue that they not only deprive victims of their "day in court," but also "shield the identity of the alleged harasser to the detriment of other employees who are potential victims."[23] Furthermore, if drafted improperly, an settlement NDA

[17] *See* RESTATEMENT (SECOND) OF CONTRACTS §175 (1981) ("If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.").
[18] *See* Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable*, 25 WM. MITCHELL L. REV. 627, 646 (1999) ("A confidentiality agreement would be construed against the employer drafter and public policy would not allow the confidentiality agreement to cover illegal activity.").
[19] *See* Denson v. Donald J. Trump for President, Inc., 2019 NY Slip Op 30611, 30611(Sup. Ct., NY Ct. 2019) (denying the defendant's motion to compel arbitration of the plaintiff's sexual harassment and hostile work environment claims against her supervisor during the 2016 President election; concluding that the arbitration clause in the non-disclosure agreement signed by plaintiff in the pre-dispute employment contract did not cover plaintiff's harassment claims asserted). However, it appears that why the harassment claims cannot be compelled to arbitration is because of the way the arbitration clause in the NDAs of the employment contract is drafted (which only covers disputes arising from plaintiff's conduct in five specific categories, while the sexual harassment claims is about "defendant's conduct in the employment context"), rather than the court's refusal to recognize the compelled arbitration as a condition in an employment contract. *Id.*
[20] *See* Perman, *supra* note 2.
[21] *See id.* (disclosing that Zelda Perkins signed an NDR that prohibited her from sharing any information about her story and trauma or the settlement to anyone who is not a party of the NDR, including her friends and families).
[22] Press Release, Lorena Gonzalez Fletcher Calls for Use of Subpoenas to Give Victims the Freedom to Speak About Workplace Abuse (April 18, 2018), https://a80.asmdc.org/press-releases/lorena-gonzalez-fletcher-calls-use-subpoenas-give-victims-freedom-speak-about.
[23] *MeToo's Impact on Sexual Harassment Law Just Beginning*, LAW360 (July 11, 2018), https://www.law360.com/articles/1061044.

may violate Title VII by prohibiting employees from filling charges with or assisting the investigation of the Equal Employment Opportunity Commission (EEOC).[24] A court may weigh the employer's interest in dispute resolution against the public interest in enforcing laws against sexual harassment, and refuse to enforce a promise "if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."[25] Therefore, in the case of a sexual harassment repeat offender or an extremely abusive or hostile work environment, one can reasonably expect a court to weigh the public policy harmed by the agreement to keep silent over the employer's interest in preserving its good will.

To sum up, even if validly established by settlement NDAs covering sexual harassment claims, the victim's obligation of keeping silent can be released under the state contracts law, if the nature of the underlying misconduct is serious enough for a victim to raise an effective unconscionability, duress, or public policy defense. Nevertheless, the limitation of this approach is obvious: the true shackles are the risk of the employee's forfeiture of part or all of the settlement proceeds via the liquidated damages clause in the settlement or via unjust enrichment if there are no agreed liquidated damages. The dilemma of win-justice-but-lose-money will make the victim hesitate to risk violating her settlement NDAs and be subject to unpredictable lawsuits or arbitration proceedings when she has the chance to assist the investigation with EEOC or help other victims to prove their cases.

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[24] *See* 42 U.S.C. §§ 2000e *et seq.*; *compare* EEOC v. Astra USA, 94 F.3d 738, 740-41 (1st Cir. 1996) (upholding a preliminary injunction enjoining an employer "from entering into or enforcing settlement agreements containing provisions that prohibit settling employees both from filing charges of sexual harassment with the [EEOC] and from assisting the [EEOC] in its investigation of any such charges;" concluding that "abrogating the confidentiality clauses of the settlement agreements would be no disincentive to settling complaints, while enforcing them would seriously hinder the EEOC's enforcement of laws against sexual harassment, the court held that such settlement agreements were unenforceable as a matter of public policy") *with* Saini v. Int'l Game Tech., 434 F. Supp. 2d 913, 913 (D. Nev. 2006) (granting a former employer's motion for preliminary injunction and ordering the employee to refrain from disclosing confidential information and trade secrets in violation of two confidentiality agreements, and to return confidential and proprietary documents).

[25] *Astra U.S.A.*, 94 F.3d at 744-45 (quoting Town of Newton v. Rumery, 480 U.S. 386 (1987)).

Sometimes the lawyers negotiating the confidentiality provisions for the employer or harasser may try to draft the NDA in a way that also put the confidentiality restraint on the victim's lawyer; however, even without those carefully-drafted restraints, a court may still find an implied-in-face confidentiality contract for the victim's attorney, even though he or she who did not sign the NDA, based on the attorney's actions and the circumstances surrounding the signing of the NDA.[26] However, an NDA may not unreasonably restrict the lawyer's later representation of other employees of the same employer.[27]

B. Can the Existing law Regulating General NDAs Solve the Use of NDAs in the Sexual Harassment or Misconduct Claims?

In a modern employment relationship, rooted in common law (usually contracts law), NDAs may serve as one kind of legitimate restrictive covenant in an employment contract to protect a company's profitability and investments, often hand in hand with a non-compete agreement (NCA), by preventing the employee from disclosing or using trade secrets and other business information about new products or services.[28] There are neither state statutes that specifically authorize NDAs' legality, nor an uniform approach across different states to decide the legality, enforceability, or limitations of an NDA.[29]

On one hand, about 39 states' NDA limitations in employment contracts, while not addressed under state statutes, are enforceable under common law[30]. Nine states have applied the

[26] *See* Nabisco, Inc. v. Ellison, 1994 U.S. Dist. Lexis 16041, 16041 (E.D. Penn. 1994) (finding it unreasonable for the victim's attorney to disclose the settlement of the age discrimination suit to the press after he had passively accepted legal fees from the settlement proceeds that the victim received from the employer when he knew the confidentiality terms of the agreement; the court denied the victim's attorney's motion to dismiss the employer's claims of breach of implied-in-fact contract and breach of a quasi-contract).
[27] *See* Fromholz, *supra* note 5.
[28] *See Restrictive Covenants in Employment*, 8 NATIONAL SURVEY OF STATE LAWS (Richard A. Leiter, ed., 8th ed. 2019) 395, 395-434 (using a chart to summarize the enforceability of non-compete agreements (NCAs) and nondisclosure agreements (NDAs) and their limitations under state laws in fifty states of the U.S.).
[29] *See id.* at 395.
[30] *See id.* at 396-434 (showing that the 11 states that have statutes covering the enforceability of NDAs are Alabama, Colorado, Florida, Georgia, Hawaii, Idaho, Michigan, Nevada, New Hampshire, Oregon, and South Carolina; all the other 39 states deem NDAs enforceable under common law but do not have governing statutes).

same or similar restrictions as NCAs to NDA limitations, and those states often use a multi-factor test.[31] Tests to decide whether a NDA is enforceable under state common law vary by including one or more of the factors as below: its reasonableness with respect to time and place, its ancillary status to an enforceable/valid employment contract, the existence of enough consideration, the nature of the business and the employer's protectable business interest, fairness and hardship to the employee, and/or the extent of public interest interference.[32] States also differ in standards used to find whether a trade secret interest exists to be protected by an NDA.[33]

On the other hand, only ten states have statues covering the enforceability of NDAs in employment-related settlement agreements.[34] Among them, Florida, Louisiana, and Washington adopted anti-secrecy laws voiding NDAs in settlement agreements that conceal any information related to "public hazard" or helpful for the public to prevent injury from "public hazard."[35] New

[31] *See id.* The nine states are Arizona, Connecticut, Florida, Georgia, Idaho, Minnesota, Montana, North Carolina, and Ohio. *Id.*
[32] *See id.* For example, controversy sometimes arises regarding NDAs when an unreasonably long period of compliance or an unreasonable amount of penalties in the case of violation is imposed on one party of the contracts. *Id.*
[33] *See id.*
[34] *See id.* (including California, Florida, Indiana, Louisiana, Nevada, New York, North Carolina, Oregon, Texas, and Washington).
[35] *See id.* at 401, 407 & 431; *see also* SUNSHINE IN LITIGATION ACT, FLA. STAT. § 69.081(LEXIS through 2019-21 Legis. Sess.) (finding "any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard" void, contrary to public policy, and unenforceable); LA. C.C.P. Art. 1426 (LEXIS through 2018 legislation) (not allowing "a court to issue a protective order preventing or limiting discovery or ordering records sealed if the information or material sought to be protected relates to a public hazard or relates to information which may be useful to members of the public in protecting themselves from injury that might result from such public hazard, unless such information or material sought to be protected is a trade secret or other confidential research, development, or commercial information"); REV. CODE WASH. (ARCW) § 4.24.611 (LEXIS through 2019 Sess.) ("[c]onfidentiality provisions may be entered into or ordered or enforced by the court only if the court finds, based on the evidence, that the confidentiality provision is in the public interest;" stating that members of public have right to information to information necessary to understand nature, source, and extent of risk associated with a public hazard); Prasad, *supra* note 8 (finding that Florida became a pioneer in anti-secrecy laws with the enactment of the Sunshine in Litigation Act (Sunshine Act), and that Fla. Stat. Ann. § 69.081 prevents a judge from entering any order that intentionally or incidentally conceal a "public hazard," including orders that seal documents, evidence or settlement agreements).

York and Texas has "open records" law sharing the assumption that settlements of judicial proceedings are court records open to the public, with very limited exceptions of nondisclosure.[36] California, however, generally allows settlement NDAs, subject to some exceptions of mandatory disclosure to the public.[37] Specifically, California does not allow settlement NDAs for certain cases of dependent adult abuse or elder abuse, and of felony sex offenses.[38] There is not a right or wrong answer for state legislators in choosing different legal schemes to tackle the disputes over settlement NDAs because there is no silver bullet to accommodate all the interests involved, but analysis of their impact may shed some light for future legislation on the use of NDAs in the workplace sexual harassment areas.

As for the approaches that the ten states adopt, no matter they are "public hazard," "open records," or "felony sex offenses," almost all of them fall into the civil procedure parts of the state statutes, requiring the courts to restrict freedom of contract and void certain NDAs to the extent that ensures public access to the information that may endanger public interest or help establish a transparent judicial system and raise the awareness of the public of those public hazards, court records, or felony sex offenses.[39] The decisions are public-policy driven and fact-

[36] *See Restrictive Covenants in Employment*, *supra* note 28, at 417 & 429; *see also* N.Y. COMP. CODES R. & REGS. TIT. 22, § 216.1 (Lexis Advance through May 3, 2019)(banning settlement NDA for in-court settlements; requiring the courts not to seal court records unless another rule applies for good cause as well as considering interests of public in determination); TEX. R. CIV. P. 76a (WEST 2019) (effective Sept. 1, 1990) (prohibiting the use of NDAs in settlements that cover "information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government," because they are deemed "court records" presumed to be open to the public; not applying to monetary consideration in settlements).
[37] *See* Prasad, *supra* note 8, at 2534.
[38] CAL. CIV. PROC. CODE § 1002 (LEXIS through 2019 Sess.); *see Restrictive Covenants in Employment*, *supra* note 28, at 399; *Id.* at 2535 (predicting the potential of the newly adopted law to be applied to "rapes or sexual harassment with criminal undertones that are settled with NDAs" due to its coverage of "sexual acts that can be prosecuted as felonies").
[39] *See* Blanca Fromm, *Bringing Settlement Out of the Shadows: Information about Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 679 (2001) (finding that several states have enacted "sunshine reforms," which "create, to varying degrees, a presumption of public access to court records of settlements and unfiled settlement agreements in cases involving the administration of government or issues of public health or safety").

sensitive depending on the tension between the personal desire for confidentiality and the public need for information.[40]

The disadvantage of these state approaches regulating settlement NDAs is also obvious—they are restrictions imposed on the state judicial power, rather than directly on the parties themselves. A settlement, however, generally needs not to be approved by a court.[41] If parties settle without filing a case or before the trial of the case and are comfortable relying solely on the contractual NDA obligations, the settlement NDAs will be kept secret between them.[42] Only if they later seek a protective order from the court to grant the private NDA enforceability guaranteed by the judicial power, or either party files a breach-of-contract claim to the court, do such laws perhaps allow the courts to apply those standards to the NDA, and decide whether the protective order is issuable or the NDA is voidable.[43] When settling during litigation, the parties can also request the judge's approval of the settlement (with NDAs) by "a court order of secrecy" or protective order; that would require the judge to balance the tension between the value of disclosure and the value of secrecy. In either way, NDAs are not watertight.[44] In addition, a claimant can still testify under subpoena even he or she signed an NDA previously.[45]

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[40] *See id.* at 633 (examining the settlement information from different sources and concluding that concludes that it is possible "to increase access to settlement information while ensuring confidentiality").
[41] *See* R. Kyle Alagood, *Settlement Confidentiality: A "Fracking" Disaster for Public Health and Safety*, 45 ELR 10459, 10462 (2018).
[42] *See id.*
[43] *See* Blanca, *supra* note 39, at 678. In Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3d Cir. 1994), for instance, the Third Circuit held that a court could not issue any protective order, such as an order to seal records, without first weighing public and private interests to determine whether "good cause" to issue the order exists. *Id.*
[44] *See* Blanca, *supra* note 39, at 677; *see, e.g.*, Baker v. General Motors Corp., 522 U.S. 222 (1998) (finding that the Full Faith and Credit Clause did not bar a person from testifying in a deposition in one state, when, as part of a settlement agreement in an earlier case, the person had been enjoined by the court of another state from testifying in future litigation); Kalinauskas v. Wong, 151 F.R.D. 363 (D. Nev. 1993) (holding that a party to a nondisclosure agreement could be deposed in a subsequent lawsuit about what she had agreed to keep secret, when the information was very important, and its disclosure would made discovery more efficient without substantial injury to the party opposing disclosure).
[45] *See id.*, *Baker*.

Given the history of employers' buying silence of the workplace sexual harassment victims through private settlements, it remains unclear how the courts will apply those state statutes to the workplace-sexual-harassment NDAs if either a protective order is sought, or a party asks the court to void the NDA. With the impetus of the #MeToo movement, it is possible that more victims may want to challenge the NDAs that they previously agreed to by requesting a court to intervene.

There are two examples where a court set aside NDAs in the context of employment discrimination. The First Circuit's decision in *EEOC v. Astra U*.S.A. allows a third party, the EEOC, to enjoin private settlement agreements with NDAs that would prevent the employees from "volunteer[ing] any information to the commission that is beyond the scope of an ongoing investigation,"[46] because "the public policy interest of EEOC enforcement of Title VII outweighs a party's interest in maintaining the confidentiality of his private settlement agreements."[47] Also, in *Kalinauskas v. Wong*, the court allowed an employee with a pending employment discrimination lawsuit to depose a former employee of the same employer who had signed an settlement NDA that prohibit the settling employee from "discuss[ing] any aspect of [her] employment…other than to state the dates of her employment and her job title."[48]

Although the two cases were addressed under the public policy rule of the state contracts common law framework rather than any state statutes, they can offer some insight of how the courts will interpret the "public hazards" or "public interest" of the state statutes in an employment discrimination case. It seems that the confidentiality of the workplace sexual misconduct may not constitute a "good cause" exception to seal the record or overweight the

[46] *Astra U.S.A.*, 94 F.3d at 741.
[47] Eric J. Conn, *Hanging in the Balance: Confidentiality Clauses and Post-Judgment Settlements of Employment Discrimination Disputes*, 86 VA. L. REV. 1537, 1541 (2000).
[48] 151 F.R.D. 363, 365 (D. Nev. 1993).

public interest of access to court records under the New York "open records" approach.[49] There is also a strong argument that those NDAs will constitute "public hazards" in the sense of precluding victims from warning other vulnerable groups of people and shielding the accused from criminal scrutiny.[50] For the workplace sexual offenses that may be prosecuted as felonies, a California court will deem the settlement NDAs of these offenses between the employer and employee null and void.[51] Therefore, these state statutes focusing on the value of information transparency to the public have a great potential to be applied by state courts to the workplace-sexual-harassment-claim settlement NDAs.

Information transparency is a first and important step to change the climate of secrecy of sexual harassment in the workplace and enable individuals to make informed choices when facing sexual discrimination.[52] Without public access to those records, employers thought that they could customize and accommodate the liability of sexual harassment behaviors in the workplace—no harm was acknowledged, no responsibility was taken, no trauma would heal, no repetition could be prevented, and no justice would be restored.[53] Given the benefit of these state statutes that increase information transparency and protect public interest (especially in those

[49] *See* N.Y. COMP. CODES R. & REGS. TIT. 22, § 216.1 (Lexis Advance through May 3, 2019).
[50] *See* Wexler, *supra* note 15, at 85 (2019); *see* Daniel Hemel, *How Nondisclosure Agreements Protect Sexual Predators*, VOX (Oct. 13, 2017), https://www.vox.com/the-big-idea/2017/10/9/16447118/confidentiality-agreement-weinstein-sexual-harassment-nda (arguing that a pattern of workplace-based sexual harassment on the part of a powerful individual like Cain, Ailes, or Weinstein amounts to a "public hazard," if the state "sunshine-in-litigation" laws bars the enforcement of confidentiality clauses in settlements if they conceal information related to "public hazards;" finding that a Florida-based labor and employment attorney, Chloe Roberts, proposed the exact theory in an opinion piece to the court).
[51] *See* CAL. CIV. PROC. CODE § 1002, *supra* note 38.
[52] *See* Elizabeth A. Arsonson, *The First Amendment and Regulatory Responses to Workplace Sexual Misconduct: Clarifying the Treatment of Compelled Disclosure Regimes*, 93 N.Y.U. L. REV. 1201, 1209 (2018) (analyzing the information asymmetry behind a government's requiring mandatory disclosures and its harms to public interest, including "increased risks being borne by the public," "the impairment of public services," "the perpetuation of social inequities," and "corruption").
[53] *See* Groucutt, *supra* note 13, at 90 ("Before #MeToo, sexual harassment was regarded as a liability that employers could generally accommodate."); *see also* Wexler, *supra* note 15, at 70-91 (discuss the importance of restorative justice in the #MeToo movement).

sunshine-in-litigation states), more and more state legislators may also want to enact similar laws to offer an option for the judicial power to intervene in these settlement NDAs covering sexual misconduct to protect public interest.

II. Legislative Responses to the Use of NDAs Regarding Workplace Sexual Misconduct Claims— Can Silence be Bought?

Agreeing to keep the secret is arguably an essential part of the consideration that the complainant needs to pay to get the settlement proceeds from an employer who desires to avoid any negative publicity surrounding the sexual misconduct of its executives.[54] Given the role that NDAs long played in enabling high-level and high-profile individuals accused of abuse across industries to evade discovery, federal and state legislators proposed a variety of policies and bills, and passed some of them. [55]

A. Federal Legislative Responses

At the federal level, Section 162(q) of the Tax Cuts and Jobs Act of 2017 disallows the deduction of any sexual harassment or abuse settlement and attorney's fees related to such an settlement or payment if "such a settlement or payment is subject to a nondisclosure agreement," which may greatly reduce the economic benefits and incentives of private employers to buy silence from the victims of sexual misconduct in the workplace.[56]

Further, the Sunlight in Workplace Harassment Act, if signed into law, will require publicly held companies to provide information about out-of-court settlements of disputes involving "harassment" or "discrimination" in violation of a series of federal employment discrimination laws.[57] Instead of directly prohibiting the use of NDAs in the sexual harassment settlements, it, in essence, compels disclosure of a broader scope of settlement agreements

[54] *See* Perman, *supra* note 2.
[55] *See infra* notes 56-87 and accompanying text.
[56] 26 U.S.C. § 162 (q). However, it seems to apply to both defendants and plaintiffs alike. *Id.*
[57] Sunlight in Workplace Harassment Act, S. 2454, 115th Cong. (2018).

involving consideration paid to an individuals as a result of the individual's allegation that she was the victim of sexual harassment, discrimination, and abuse, regardless of whether a nondisclosure provision exists in the settlement.

Furthermore, in the wake of the discovery that members of Congress used public funds (with approximately $174,000 paid by the Treasury Department over the last five years in House member officers[58]) to settle workplace sexual harassment and misconduct claims, the Congressional Accountability and Hush Fund Elimination Act ("the Fund Elimination Act") was introduced as H.R. 4494 in November 2017 to prevent any use of public funds for payments of awards or settlements in connection with acts of sexual harassment. It prohibits imposition of nondisclosure agreements as prerequisite for procedures involving an act of sexual harassment or sexual assault.[59] It also aims to have the Office of Compliance disclose the names of the perpetrators and the amounts of any previous award or settlement paid by public funds in sexual harassment cases as well as requiring the perpetrators to pay back those monies.[60] However, the House has not yet considered the act, which is currently stalled with a bleak prospect for passing.

2018 witnessed an unprecedented amount of state legislation and policies on sexual harassment, with "32 states [having] introduced over 125 pieces of legislation."[61] During the

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[58] *See* Michelle Ye Hee Lee & Elise Viebeck, *Treasure Paid $ 174,000 in Taxpayer Money to Settle House Sexual Harassment Claims*, WASH. POST (Dec. 19, 2017), https://www.washingtonpost.com/powerpost/new-data-released-on-house-harassment-sex-discrimination-claim-settlements/2017/12/19/472f49d6-e4c8-11e7-833f-155031558ff4_story.html?noredirect=on&utm_term=.8b7eae529ff9; *see also* Congressional Accountability and Hush Fund Elimination Act (hereafter "Fund Elimination Act"), H.R. 4494, 115th Cong. (2017), https://www.govtrack.us/congress/bills/115/hr4494/summary ("a 1995 law called the Congressional Accountability Act allows taxpayer funds to be used for paying settlements when members of Congress were accused of sexual harassment."); Congressional Accountability Act of 1995, S. 2, 104th Cong. (1995), https://www.govtrack.us/congress/bills/104/s2.

[59] *See id*., Fund Elimination Act.

[60] *See id.*

[61] *See 2018 Legislation on Sexual Harassment in the Legislature*, NCSL (Feb. 11, 2019), http://www.ncsl.org/research/about-state-legislatures/2018-legislative-sexual-harassment-legislation.aspx ("States have introduced legislation to expel members, criminalize sexual harassment in legislatures, and mandate harassment training within the legislature, among other topics.").

2018 legislative sessions, 16 states had introduced legislation aimed at limiting or prohibiting the use of NDAs related to sexual harassment claims.[62] California, Delaware, Illinois and New York also introduced legislation aimed at providing training for employers and employees on sexual harassment legality, policies and remedies.[63]

B. State Legislative Responses

In New Jersey, silence may be sought but agreements so providing no longer can be enforced against the employees.[64] New Jersey adopted an Act in March 2019 prohibiting employers from enforcing against employees or former employees any "provision in any employment contract or settlement agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment" (not limited to those happening in the workplace) under the New Jersey Law Against Discrimination (NJLAD), as well as prohibiting any contractual waiver of substantial or procedural rights of the victims.[65] Notably, employers still can protect other elements of a settlement agreement, including the amount of the settlement and proprietary information—though the Act now expressly limits the

[62] They are Alaska, Arizona, California, Florida, Indiana, Kansas, Maryland, New York, New Jersey, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia and Washington. *See* Suzanne Hultin, *Addressing Sexual Harassment in the Workplace*, 26 LEGIS BRIEF 17 (2018), http://www.ncsl.org/research/labor-and-employment/addressing-sexual-harassment-in-the-workplace.aspx.

[63] *See* CAL. GOV'T CODE §§ 12950 & 12950.1 (Deering, LEXIS through 2019 Reg. Sess.) (requiring that, effective on January 1, 2019, California employers with 5 or more employees (used to be 50) provide at least 2 hours of sexual harassment prevention training and education to all supervisory employees and at least 1 hour of such training to all non-supervisory employees in California by January 1, 2020); DEL. CODE ANN. Tit. 19, § 711A (LEXIS through 82 Del. Laws, Ch. 11) (requiring that, effective on January 1, 2019, employers with at least 50 employees in Delaware provide "interactive training and education to employees regarding the prevention of sexual harassment"); H.B. 3351, 101st Gen. Assemb., Reg. Sess. (Ill. 2019) (proposing that restaurants have a sexual harassment training policy and provide training to all employees); N.Y. LAB. LAW § 201-g (Consol., LEXIS through 2019) (applying to all employers regardless of size; requiring New York employers, among other things, conducting interactive sexual harassment prevention training annually, either using the state's model training materials or another program that meets the training requirements).

[64] *See* N.J.S.A. § 10:5-12.7 (LEXIS through NJ 218th 2nd Ann. Sess., eff. Mar. 18, 2019).

[65] *Id.*; *see also* N.J.S.A. §§ 10:5-12.8 to 10:5-12.11 (LEXIS through NJ 218th 2nd Ann. Sess., eff. Mar. 18, 2019); Press Release, Governor Murphy Takes Action on Legislation (Mar. 18, 2019), https://www.nj.gov/governor/news/news/562019/approved/20190318b.shtml ("S-121[...] [b]ars provisions in employment contracts that waive rights or remedies; bars agreements that conceal details relating to discrimination claims.").

protectable proprietary information to "non-public trade secrets, business plans, and customer information."[66] Non-compete agreements remain unaffected by the Act.[67]

Such an NDA, however, is enforceable against the employer under the Act unless the employee "publicly reveals sufficient details of the claim so that the employer is reasonably identifiable." The Act requires every settlement agreement (that contains an NDA covering discrimination, retaliation, or harassment claims) to have "a bold, prominently placed notice" to remind employees of this rule and right. [68] Furthermore, an employee will recover reasonable attorney fees and costs from the employer if the employer "enforces or try to enforce" the unenforceable settlement NDAs under the act.[69] An employer also cannot retaliate an employee who refuses to enter into such settlement NDAs covering discrimination, retaliation, or harassment claims.[70] The act applies only to the settlement NDAs "entered into, renewed, modified, or amended" on or after March 18, 2019.[71]

For New York, General Obligations Law § 5-336 and New York CPLR § 5003-B, effective since July 11, 2018, allows silence to be bought via NDAs in settlements so long as the victim prefers an NDA covering sexual harassment issues by signing it after a 21-day consideration period and does not revoke it after a 7-day cooling-off period.[72]

For Washington legislators, silence may be bought afterwards but not upfront. Senate Bill 5996 of Washington was signed into law, RCW 49.44.210, in March 2018 and took effect on June 7, 2018, does not prohibit the use of NDAs to restrict employees and former employees

[66] *See* N.J.S.A. § 10:5-12.8 (LEXIS through NJ 218th 2nd Ann. Sess., eff. Mar. 18, 2019).
[67] *See id.*
[68] *Id.*
[69] N.J.S.A. § 10:5-12.9 (LEXIS through NJ 218th 2nd Ann. Sess., eff. Mar. 18, 2019).
[70] *See* N.J.S.A. § 10:5-12.10 (LEXIS through NJ 218th 2nd Ann. Sess., eff. Mar. 18, 2019).
[71] *See* N.J.S.A. § 10:5-12.11 (LEXIS through NJ 218th 2nd Ann. Sess., eff. Mar. 18, 2019).
[72] *See* N.Y. GEN. OBLIG. LAW § 5-336 (Consol., LEXIS through 2019); N.Y. C.P.L.R. LAW § 5003-b (Consol., LEXIS through 2019).

from discussing sexual harassment allegations pursuant to a validly negotiated settlement. However, it does prohibit employers from requiring preemptive NDAs related to potential sexual harassment claims as a condition of employment.[73]

Although the general approach of lawmakers is to restrict, burden, or ban an employer's use of NDAs in a civil settlement with a victim of sexual harassment or discrimination, some states, instead, generally allow such use of NDAs, only with exceptions in very limited scenarios.[74] For them, it appears that silence could be bought, as long as it does not harm the public interest in the criminal procedure setting. Arizona, after introducing a harsh bill aiming to render NDAs in sexual harassment settlement agreements null and void, adopted a much more relaxed form of the bill on April 25, 2018, which recognizes the legality of NDAs in the settlements with an exception of those victims of sexual misconduct "responding to a peace officer's or a prosecutor's inquiry" and "making a statement not initiated by that party in a criminal proceeding" without violating the settlement NDAs that she signed or forfeiting her settlement proceeds.[75]

The approach adopted by the Vermont legislators on May 30, 2018 in the Bill H.707, now Sec. 1. 21 V.S.A. § 495h (effective on July 1, 2018) regarding the use of NDAs, together with the previous Act 183, seems to be a mix of Washington and Arizona's approaches, with an addition of the active supervision and participation of the state agencies.[76] It is worth noting that under Vermont's previous Act 183, a settlement with a nondisclosure provision cannot prevent an individual from (1) reporting sexual harassment to the Attorney General or Human Rights

[73] *See* WASH. REV. CODE ANN. § 49.44.210 (LEXIS through 2019 Sess.).
[74] *See* Jessica Post, *Feature: fighting workplace sexual harassment state and federal approaches*, 55 AZ ATTORNEY 16, 16, 2018.
[75] A.R.S. § 12-720 (B).
[76] Sec. 1. 21 V.S.A. § 495h.

Commission; or (2) "testifying, assisting, or participating in any manner with an investigation related to a claim of sexual harassment conducted by the Attorney General, a State's Attorney, the Human Rights Commission, the Equal Employment Opportunity Commission, or any other State or federal agency."[77] Such limited exception to the permissible use of NDAs in settling sexual harassment cases is subject to further restriction in the Sec. 1. 21 V.S.A. § 495h. The new law forbids the use of NDAs as a condition of employment in a pre-dispute employment contract, and further requires, on or before January 15, 2019, the Office of Legislative Council to submit a written report to the Senate and House Committees that examines mechanisms to require the employers to provide the Attorney General and the Human Rights Commission of Vermont with notice of the settlements including NDAs covering sexual harassment and misconduct.[78] It will also render those NDAs unenforceable if "in relation to a separate claim, the alleged harasser is later adjudicated by a court or tribunal of competent jurisdiction to have engaged in sexual harassment or retaliation in relation to a claim of sexual harassment."[79] A report submitted by the Office of Legislative Council of Vermont on February 12, 2019 proposed language for the mechanisms and expressed some potential legal and practical concerns. [80]

The California Governor signed a trio of bills into law applying to employment NDAs made on or after January 1, 2019, expanding the scope of cases banning the use of sexual-misconduct related settlement NDAs from cases of felony sex offenses to all claims in litigation

[77] 21 V.S.A. § 495h(h)(2).
[78] *See id.*
[79] *Id.*
[80] *See* Damien J. Leonard, Esq., VT. OFFICE OF LEGIS. COUNCIL, *Report Pursuant to 2018 Acts and Resolves No. 183, Sec. 10 Regarding Specific Issues Related to Nondisclosure Provisions in Agreements to Settle Sexual Harassment Claims*, available at https://legislature.vermont.gov/assets/Legislative-Reports/Sexual_Harassment_NDA_Provisions_Report.pdf.

or administrative proceedings related to an act of sexual assault, harassment, or discrimination.[81] Now, silence for such claims can only be bought in a private settlement that never becomes a part of court or agency records, and even if being bought, is still subject to the exception of an obligation to testify in a criminal or civil case.

Civil Code § 1670.11 (added by AB 3109), similar to the criminal proceeding exception of Arizona, voids contractual provisions that waive any right to testify regarding "alleged criminal conduct or alleged sexual harassment" and allows the party of the NDRs to testify about alleged criminal conduct or sexual harassment when required or requested by "a court order, subpoena, or written request from an administrative agency or the legislature." [82]

Code of Civil Procedure § 1001 (added by SB 820) goes further than the "open records" plus "victim preference" approach adopted by New York in protecting public access to the court records.[83] It voids any settlement NDA that prevents the disclosure of "factual information" that is related to a claim filed in a civil action or an administrative action regarding an act of sexual assault, sexual harassment, workplace harassment or discrimination based on sex, or an employer's failure to prevent such workplace misconduct or related retaliatory conduct.[84] It protects the claimant's privacy by permitting the parties to include a provision that shields the identity of the claimant (and facts that could lead to the discovery of her identity) when requested by the claimant, unless a government agency or public official is a party to the settlement agreement.[85] The accused, however, is not given such right. Similar with New Jersey, it

[81] *See* Susan E. Groff, *California Restricts Confidentiality Provisions Concerning Information Related to Sexual harassment*, Nat'l. L. R. (Oct. 8, 2018), https://www.natlawreview.com/article/california-restricts-confidentiality-provisions-concerning-information-related-to; *supra* note 38 and accompanying text.
[82] *Compare* Cal. Civ. Code § 1670.11 (Deering, LEXIS through 2019 Sess.) *with supra* note 75.
[83] *Compare* Cal. Civ. Proc. Code § 1001 (Deering, LEXIS through 2019 Sess.) *with supra* notes 36 & 72.
[84] Cal. Civ. Proc. Code § 1001(Deering, LEXIS through 2019 Sess.).
[85] *Id.*

expressly allows the parties to include a provision that precludes the disclosure of the amount paid in settlement of a claim.[86]

Cal. Gov't Code § 12964.5 (added by SB 1300) amends the California Fair Employment and Housing Act (FEHA, Cal. Gov't Code §§ 2900 – 12996) and adopts a similar approach with Washington's by prohibiting preemptive NDAs required by employers as a condition of employment.[87] The new code section makes it an unlawful employment practice to require employees to sign "a non-disparagement agreement" or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment. However, it allows a non-disparagement provisions in a "negotiated" settlement agreement of a claim filed by the employee in court, before an administrative agency, alternative dispute resolution forum, or through an employer's internal complaint process, and further defines "negotiated" as voluntary, deliberate, informed, giving consideration of value to the employee, and giving notice and an opportunity to retain an attorney to the employee.

C. How Will the Federal and State Legislative Responses Resolve the Disputes over Sexual-Harassment-Settlement NDAs?

1. Incentives, Strategies, and challenges for the parties

Depending on the value of confidentiality of the underlying information of NDAs, the price that an employer will pay may differ. The greater value of confidentiality for the underlying information has, the more leverage an employee may have in negotiating a higher amount of consideration. The value of confidentiality of a piece of information may be influenced by different factors, two of which are whether it relates to illegality and to

[86] *Id.*
[87] *Compare* Cal. Gov't Code § 12964.5 (Deering, Lexis through 2019 Sess.) *with supra* note 73.

profitability. In the employment sexual harassment cases, the impulse behind employers' inclusion of NDAs in settlements is driven more by the illegality of the sexual misconduct, in contrast with the profitability of the confidential information in a trade secret case. The illegality of the sexual misconduct create pressure for the employer to settle because it wants to avoid the future high-stake law suits and try to preserve its reputation.[88] Confidentiality guaranteed by NDAs can give defendants comfort because they do not want to be exposed to any additional similar claims or suffer reputational costs after the settlement is disclosed, as well as giving plaintiffs leverage because they can request a higher price in exchange for the NDAs.[89] Therefore, for those companies whose stock price will easily be influenced by negative news, usually big, public-held companies, the value of confidentiality of the illegal sexual misconduct will be higher than other small, privately held companies.

Also, it is generally accepted that victims of sexual harassment or sexual misconduct have the right to control their own cases and "deserve to be accorded the agency to decide the purpose and strategy of their legal actions and even whether to pursue litigation at all."[90] Therefore, the employees' preferences and situations will also lead to their different strategies and choices in shaping a settlement NDA. Some factors influencing the leverage power of employers and employees are shown at Table 1 as below.

[88] *See* Blanca, *supra* note 39, at 671. ("[M]any high-stakes cases settle under confidential agreements because the defendant is willing to pay for a secret settlement to insulate itself from future lawsuits;" "cases in which the parties are concerned about protecting their reputation may settle for the benefit of confidentiality, rather than risk trial in which a jury publicly acknowledges liability.").
[89] *See id.* at 674. (finding that defendants' attorneys prefer NDAs because they don't want to expose their clients to additional liability, and that plaintiffs' attorney favors NDAs as well because they can place a high price tag on the confidentiality).
[90] Lesley Wexler, *Ideal Victims and the Damage of a Damage Free Victory*, VERDICT (Sept. 29, 2017), https://verdict.justia.com/2017/09/29/ideal-victims-damage-damage-free-victory (arguing that to seek compensation should not minimize victimhood).

Table 1. Factors influencing leverage power of parties in negotiating a settlement NDA

	Employers	Employees
Leverage for Employers May Increase/ Value of Settlement NDAs May Decrease for Employers	*Risk of reputation loss decreases (legality of the conduct leading to the settlement NDAs); *The positive relation of such reputation loss with the economic loss of the business decreases (e.g. small, private-held companies/low-profile harasser). *Profitability of the confidential information decreases; *Risk of unenforceability of the settlement NDAs under federal or state laws increases; *expenses/costs for the settlement NDAs increases.	*Desire for personal privacy (fear of negative public judgments or career backlash) increases; *Low-profile sexual assault victims;
Leverage for Employees May Increase/ Value of Settlement NDAs May Increase for Employers	*Risk of reputation loss increases (Illegality of the conduct leading to the settlement NDAs); *The positive relation of such reputation loss with the economic loss of the business increases (e.g. big, public-held companies; celebrity/entertainment trade); *Profitability of the confidential information increases; *Risk of unenforceability of the settlement NDAs (mandatory disclosure) under federal or state laws decreases; *expenses/costs for the settlement NDAs decreases.	*Desire for personal privacy (fear of negative public judgments or career backlash) decreases; *High-profile sexual assault victims[91];

At the federal level, the obligation for public-held corporations to disclose employment sexual misconduct lawsuits or settlements under the Sunlight Act (if adopted) may decrease the value of the settlement NDAs for the employers because less information can be kept confidential in those NDAs. However, given the importance of reputation for the publicly held companies and the limited scope of information required for the mandatory disclosure under the proposed Act, those employers will probably still want to have settlement NDAs. Since the proposed Act will not apply to privately held companies, the incentives and strategies of employers and employees in those companies will not be influenced.

[91] *See id.* (using the example of Tayler Swift, who only asked for symbolic damages of one dollar, instead of compensatory or punitive damages, in her countersuit against David Mueller alleging his sexual assault on her during a meet and greet; showing that a minority-trend of high-profile sexual assault victims declined to seek or renounce financial gain as part of their related legal actions).

The ban in the federal tax law on an employer's expensing the payment of any sexual harassment or abuse settlement that includes NDAs, as well as the attorney's fees related to such a settlement or payment, will raise the cost for employers that pay the same settlement proceeds to the victims compared with the situation prior to the tax reform. This may decrease the available funds for the victims, especially when the budget is tight for small businesses or the amount of settlement proceeds is huge for big corporations.[92] Another possible result is that corporations will directly give up settlements when they have to abandon NDAs due to tax costs. Similarly, the Fund Elimination Act, which prevents any use of public funds for payments of awards or settlements in connection with acts of sexual harassment, if enacted, will increase the costs for the harassers, and thus may decrease the available funds that harassers can give victims. Nevertheless, it may also decrease harassment behaviors of politicians without harming victims, because the shortage of fund support will probably not lead to politicians' refusal to pay settlement proceeds. After all, as high-profile harassers, they cannot bear the risk of losing good name if no NDAs are arrived at.

Comparing the two NDA control measures above, policies that treat persons in different situations differently seems to be more efficient in achieving fairness. Due to the concerns about their reputation loss, law that increases settlement expenses for high-profile persons may work effectively in decreasing their incentives to sexual harass others, and the existing victims do not have to deal with not getting settlements. On the contrary, for low-profile harassers or companies, laws that increases settlement expenses for them may also negatively decrease the

[92] *The Potential Impact of Taxing Nondisclosure Agreements*, LAW 360 (Jan. 19, 2018), https://www.law360.com/articles/1002422/the-potential-impact-of-taxing-nondisclosure-agreements (calculating the tax burden shifted to parties after the tax reform; arguing that those provisions will have "a negligible effect on the number of agreements that are subject to disclosure, will reduce the value of settlements paid to victims of sexual harassment, and that the increased taxes will be paid largely by victims of harassment").

settlement proceeds that victims can get. The cancellation of tax deduction benefits for all employers can barely improve or even harm those low-profile victims' situation when dealing with low-profile employers. Nevertheless, it may serve other public interest purposes, such as restoring information transparency in processes of resolving sexual harassment cases, collecting more taxes to invest in public good, and showing the government's open reprimand of workplace harassers.[93]

At the state level, there is a trend of ensuring information transparency to establishing a well-rounded protection and support legal system for victims. Before the #MeToo movement, most state laws about settlement NDAs, if there were any, focused on the public access to information (though doctrines like "open records" or "public hazards"). After the #MeToo movement, more efforts have been put in offering the victims more leverage in or outside the courtrooms.

Critics for banning all settlement NDAs covering sexual harassment or discrimination claims worry about the loss of bargaining power of victims to get higher settlement proceeds in this situation, because the risk of unenforceability of those settlement NDAs under state laws will discourage employers from entering into a settlement, resulting in the victims' being compelled to go to a more expensive trial or arbitration.[94] Therefore, for those states that have restricted settlement NDAs to some extent out for the public interest purposes, some of them, in

[93] *See* Margaret Ryznar, *#MeToo & Taxes*, 75 WASH. & LEE L. REV. ONLINE 53, 59 (arguing that targeting nondisclosure agreements through the tax law aims to make workplaces safer for employees).
[94] Feminist lawyer Gloria Allred described a NDA ban "a mixed bag," and argued that removing the confidentiality clause would make it more difficult to achieve a maximum settlement for victims because there would be less incentive for defendants to settle. Perman, *supra* note 2; *see also* Fromholz, *supra* note 5, at 14 (showing that a mutual confidentiality agreement benefit both parties by avoiding going to the court and can avoid jeopardizing employees' job prospects by not showing any record of litigation in her background checks in future job hunting); Nancy R. Hauserman, *Comparing Conversations about Sexual Harassment in the United States and Sweden: Print Media Coverage of the Case against Astra USA*, 14 WIS. WOMEN'S L.J. 45, 65 (discussing that the settlement agreement might be a positive gain for the present victim while negative for future victims and company culture).

consideration of the victim's interest as well, narrow the restrictions as exceptions to strike a balance between victim protection and information transparency;[95] some grant a third party the authority to intervene if injustice exists;[96] some give victims rather than the employers the choices to have NDAs if they want to;[97] and some also protect victims from retaliation to ensure that they can say no if they do not want to have NDAs.[98] All these measures will to some extent restore victims' bargaining power in a settlement and ensure that individuals will not sacrifice their own interest too much for public interest in information transparency.

Take New York, New Jersey, and California, for example. New York allows a settlement NDA regarding an employment sexual harassment claim so long as the victim prefers it and make an informed decision of signing it and not revoking it. Under the New York approach, although the state also imposes restrictions that may discourage employers from settling, the negative influence is minor because the freedom of choice granted to only one party (victims) restores that party's bargaining power in a settlement negotiation and creates incentives for employers to offer more attracting settlements if they really want the confidentiality.

A similar but more transparent approach is used by the California legislators. In California, if the claimant files a sexual harassment, sexual assault, or sexual discrimination claim to a court or an administrative agency, the factual information regarding those claims should be disclosed, which in essence regards the relevant NDAs entered into in a later settlement as against the public policy and void. If an employer wants to keep the settlement and

[95] *See* Subpart B of this Part. Vermont and Arizona allow settlement NDAs covering sexual harassment claims and make exceptions for victims to testify in the criminal setting. *Id.*
[96] *See* Subpart B of this Part. Vermont allows the parties to include NDAs in settlements of sexual harassment claims and introduces the power the state agencies into the post-settlement process, such as collecting information of those settlement information and automatically release the victims' NDA obligation if the harasser is latter exposed to the public in a later sexual harassment case. *Id.*
[97] *See* Subpart B of this Part, the New York approach.
[98] *See* Subpart B of this Part, the New Jersey approach.

sexual misconduct secret, it has to offer a fair amount of considerations to exchange the employee's assent to neither litigate the issue nor file a complaint of the issue to the government agencies. This substantially heightens the victim's bargaining power.

However, compared with the New York approach that deems the NDAs enforceable, California's approach, which deems a settlement NDA covering the factual information in a sexual misconduct claim in front of a court or state agency void, seems to make it impossible for either party to have the court to enforce a settlement NDA that they signed if one party later violates the NDA. Some low-profile employers may be reluctant to enter into such NDA, because unenforceability of the NDA in the state judicial system greatly decreases the value of those settlement NDAs to them. A possible result is that more and more parties give up settlement options and go to the court. The expectations of the one-sided confidentiality protection for the identity of victims by the new law of California, however, will in turn decrease the victims' fear of negative public judgments at the beginning, which may increase their bargaining power and push up their bottom lines of acceptable considerations in a settlement negotiation.

New Jersey adopts an approach that appears to be most employee-friendly among the three states. If both parties agree to enter into a settlement NDA relevant to a sexual harassment, discrimination, or retaliation claim, a court in New Jersey will deem the NDA enforceable against the employer, but unenforceable against the employee. Also, New Jersey prohibits any retaliation against the victims if they refuse to sign the NDA. Such protection can decrease the employees' fear for career backlash and thus increases their leverage in a settlement negotiation. In a word, an employee in New Jersey is free to agree to or not agree to such settlement NDAs and free to get rid of such settlement NDAs at any time as she wants. This approach, however, is

the one that most discourages an employer from entering a settlement—it could barely get any protection for any damage to its reputation. If the employee later discloses enough details to the public and discards the NDAs, due to the unenforceability of the NDAs against employees, the employer cannot sue the employee under contracts law for an agreed liquidation damage or unjust enrichment. One of two possible outcomes is thus likely: a New Jersey employer may need to pay a lot and design complex payment arrangements to motivate victims to remain silent if it really needs confidentiality, and all it can get is still an unenforceable promise; cases will not settle at all because of the lack of enforceability of the NDAs, and employers will have little incentive to settle, regardless of the negative publicity from disclosure. The worst result for an employee may be that she wants a settlement, but the employer has no incentives at all to settle. A conflict of personal interest and public policy may arise here. A possible argument for the New Jersey approach is that even if the employee may not always get what she wants, the leverage that she gets in negotiating an NDA in other scenarios and the flexibility to change her mind at any point of time under the new law should offset that. She can also benefit from the information transparency to prepare for her litigation, as well as from the decrease of workplace harassment behaviors such policy will lead to in a long term.[99]

From the three examples above, we can see the efforts of some state legislators to achieve a dynamic balance between the interest of victims in getting damages and the public interest in information transparency and harassment decrease, and to reconcile the potential conflicts when some arise. The incentive readjustments stimulated by the state legislation responses play a vital

[99] *See* Blanca, *supra* note 39, at 672 -73 (arguing that the information of past settlements in the area of sexual harassments was essential in providing "a more relevant basis for case evaluation than verdicts" for victim's attorneys to evaluate their cases in negotiations; explaining that an victim's attorney will have enhanced opportunities for strategic bargaining if they possesses more information about settlement than the opposing counsel).

role in breaking the ice in sexual harassment cases—until any such legislation is passed, sexual harassment survivors and harassers will grapple with the desire to keep a settlement confidential.[100]

2. Are Nondisclosure Agreements and Non-disparagement Agreements Separate Issues?

A non-disparagement clause often appears with a nondisclosure provision together in a settlement.[101] Nondisclosure provisions can ban the victims from talking about the details of the settlement and the facts leading up to the settlements while a non-disparagement clause can prohibit a victim not only from defaming the harasser or employer but even from making nondefamatory statements that will impair the reputation of the harasser or the employer.[102] The California's legislators adopted a lenient approach to non-disparagement clause in a workplace-sexual-harassment claims in a settlement, as long as it is fully "negotiated" through some formal or informal processes. However, if through formal process, such as a court claim or an administrative agency complaint, those non-disparagement clauses reach sexual harassment claims, Cal. Gov't Code § 12964.5 bars limiting the victim's right to disclose the factual information of the claims under Cal. Civ. Proc. Code § 1001 or right to testify under Cal. Civ. Code § 1670.11.[103]

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[100] *See* Hope Pordy, *Going beyond the Headlines: Spotlight on Sexual Harassment Law*, 44 VT. B.J. 30, 32 (2018) (arguing that employers may seek alternatives to addressing the situation absent nondisclosure agreements).
[101] *See*, *e.g.*, Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes .com/2017/10/05/us/harvey-weinstein-harassment-allegations.html (showing that Weinstein arrived at multiple settlement agreements containing both non-disclosure and non-disparagement provisions); *see also Times Reporters Describe How a Paper Trail Helped Break the Weinstein Story*, NPR (Nov. 15, 2017), https://www.npr.org/templates/transcript/transcript.php?storyId=564310240 (discussing some agreements that prohibited the victim from disparaging Weinstein and forced her to speak in a positive manner about him if contacted by the press).
[102] *See* Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 263 (2018) (citing several cases regarding different forms of nondisclosure provisions and nondisparaging clauses).
[103] *See* CAL. GOV'T CODE § 12964.5; CIV. PROC. CODE § 1001; CAL. CIV. CODE § 1670.11.

Although nondisclosure agreements and non-disparagement agreements have different definitions and applications, the existence of non-disparagement agreements can sometimes reinforce employees' obligations under nondisclosure agreements in the sexual-harassment related settlements for high-profile employers or harassers.[104] For instances, when an victim discloses details of an egregious sexual assault in the workplace, such disclosure may also arguably hurt the employer's reputation under a broad non-disparagement agreement even if they are nondefamatory statements. For those states which limit the application of settlement NDAs but do not expressly address the issue of non-disparagement agreements, the potential conflicts between the an otherwise enforceable non-disparagement agreement should also be restricted if conflicting with the state law limitations on a settlement NDA.

3. How to Release Victims from a Settlement NDA?

The new legislation often applies to settlement NDAs from the effective date and is not retroactive. For example, in New Jersey, only the employees of those unenforceable settlement NDAs established, modified, or renewed after the effective date can enjoy the benefits of automatic release of the NDA obligation by operation of law. In Vermont, after the effective date of the new law, victims who sign a settlement NDA will be released of her NDA obligation upon the harasser being adjudicated by a court in a separate case to have engaged in sexual harassment or retaliation in relation to a claim of sexual harassment.

What should a victim do if a victim who signed a settlement NDA regarding a sexual harassment case before the new law's effective date wants to release herself of the obligation to keep silent under the NDA?

[104] *See supra* notes 101 & 102.

There are four ways that a victim may use to obtain release of previous obligations under the settlement NDAs covering sexual harassment claims. First, the victims in almost every state may request the court to render a settlement NDA null and void by the contracts law defenses of unconscionability, duress, and public policy, if the victims can satisfy the burden of proof and persuasion, are willing to return unjust enrichment, and have not exceeded the statutes of limitations. Second, for the ten states that have state statutes regulating the enforceability of general settlement NDAs, victims can benefit from those previous state laws.[105] For instance, in the "public hazard" approach jurisdiction, a victim may request the court to void a nondisclosure provision in a previous settlement because the provision seeks to conceal the information related to a "public hazard." When the victims expose the settlement NDA to the court in a claim, in those "open records" jurisdictions, the settlement will become one part of the court record open to the public, which automatically waive the confidentiality unless there is good cause and public interest in keeping the settlement confidential. Third, the victims is not bound by any obligation to keep silent in some situations, such as when deposed as a witness in a criminal setting or requested to assist in the EEOC investigations. Lastly, it is possible that an employer will be willing to release the victims' NDA obligations to restore its reputation at the pressure from the public or have to release those contract obligations in certain special situation, which is rare but did happen in the #MeToo movement.[106]

III. From Information Transparency to Systematic Protection—Should Silence be Bought?

[105] *See* subpart B of Part I of this essay.
[106] *See* Perman, *supra* note 2 (finding that the Weinstein Co. filed for bankruptcy and released anyone who had signed an NDA resulting from claims of sexual misconduct on the part of Harvey Weinstein).

The underlying rationale for attacking the #MeToo movement is that a person is not guilty when he is simply charged online without any trial procedures, including cross-examinations to prove that he is guilty.[107] Opponents of the legislation in response to the #MeToo movement, however, is not without its pitfalls.[108] Even proponents of such legislation concern about a blanket ban on NDAs, asserting that sexual harassment victims often desires confidentiality to avoid potential backlash from coworkers and future employers or the public and more leverage power to have the employer to pay out a satisfactory amount of settlement proceeds.[109]

More information transparency, in the long run, benefit the whole legal system and the individuals. States should be encouraged to explore the legislation that most conforms with their people's interest and preserves the justice for individuals as much as possible. There are a variety of potential approaches to reduce the effectiveness of harassers' use of nondisclosure provisions as a tool at the workplaces where harassment and discrimination are prevalent.[110] By observing how different states achieve the balance between the public access to the sexual harassment

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[107] *See* Lenora Lapidus & Sandra Park, *The Real Meaning of Due Process in the #MeToo Era*, THE ATL. (Feb. 15, 2018), https://www.theatlantic.com/politics/archive/2018/02/due-process-metoo/553427/ (admitting that "those accused of domestic violence and sexual assault are certainly entitled to due process").

[108] *See id.* (arguing that fairness also requires that those reporting violence and harassment be fully heard, especially when "for far too long, those who suffered domestic violence and sexual assault—the vast majority of whom are women—have been disbelieved, ignored, and even punished"); *Compare* Perman, *supra* note 2 (stating that Schuyler Moore, a partner at Greenberg Glusker, called legal restrictions on NDAs misguided because many sexual harassment cases were "extortion" and pointed to a settlement case that he negotiated for a celebrity client, who he said was wrongfully accused) *with* Jim Rutenberg, *A Long-Delayed Reckoning of the Cost of Silence on Abuse*, N.Y. TIMES (Oct. 22, 2017), https://www.nytimes.com/2017/10/22/business/media/a-long-delayed-reckoning-of-the-cost-of-silence-on-abuse.html (citing the comment of Gloria Allred, a high-profile lawyer for the actress Kristina Hagan who charged that the television star David Boreanaz had harassed her when she was an extra on his Fox show "Bones," which is that a unusually large amount of money paid to a claimant for an NDA was more likely "an admission that the accused [felt] that he [had] risk and that he [had] done something that he should not have done").

[109] *See* Perman, *supra* note 2.

[110] *See* Leonard, *supra* note 78, at 11("The approaches include giving the victim the option to disclose the details of his or her claim, prohibiting nondisclosure provisions from applying to the facts of a claim, limiting the number of nondisclosure provisions that may be used with respect to claims against a specific employee, granting victims time to review and rescind agreements containing nondisclosure provisions, and enacting sunshine in litigation protections.").

information and individuals' access to damages, we may find some guidance for future legislation.

Table 2. Enforceability and Limitations of Employment-related settlement Non-disclosure Agreements and Sex-Harassment-related Settlement Non-disclosure Agreements in some states

	Contracts Law	**Enforceability and Limitations of Employment-related Settlement Non-disclosure Agreement**	**Enforceability and Limitations of Sex-Harassment-related Settlement Non-disclosure Agreement**
New York	Unconscionability, duress, public policy, and other defenses that may void a contract	Open Records	Settlement NDAs allowed if at the claimants' preference
Washington		Public Hazard	Banning NDAs as employment conditions in a pre-dispute employment contract; Allowing NDAs in a settlement
California		Settlement NDAs not allowed for felony sex offense cases	Settlement NDAs not allowed if the sexual harassment or discrimination claim is filed with a court or an administrative agency
Vermont		N/A	*Participation of state agencies (collecting settlement NDA information) *Previous victims who signed a settlement NDA will be released of her NDA obligation upon a court judication of the harasser's sexual harassment or retaliation accusation in a separate case.
New Jersey		N/A	Settlement NDAs enforceable against the employers, not against employees

At Table 2, we can see a combination of general and specific rules, as well as procedural and material rules, of laws that are applicable to the settlement NDAs in the employment sexual harassment area. In common law jurisdictions, the judicial and legislative agencies are generally reluctant to interfere with the freedom of contract; however, when the parties have very unbalanced bargaining power and the contracts may harm or compromise public policy, courts would step in.[111] To increase the effective participation of the court in regulating these contracts, the state legislators at Table 2 introduced procedure rules (open records, public hazards, etc.) and

[111] *See* Prasad, *supra* note 8, at 2538 (finding bargaining power of the powers greatly unequal, the terms of the settlement tend to unreasonably favorable to the strong party, the values exchanged by the parties are greatly different).

substantive rules (adjustments to the rights or obligations of the parties involved through restrictions on the enforceability of NDAs) to prevent harm to public policy and preserve individual justice.[112]

It should be noted that some groups, such as low-wage workers, unprivileged women, and marginalized groups may be disproportionately impacted under those aggressive approaches that a state may adopt, such as banning NDAs in employment discrimination or sexual harassment cases, which will lead to their receiving low settlement amounts when they also lack the ability to speak up, and the harasser is not famous enough to draw public attention.[113] The Sunlight Act and the Funds Elimination Act proposed at the federal state level shed some light for tailoring different restrictions for different groups of employers (harassers) to achieve a balance between promoting information transparency (harasser deterrence) and increasing bargaining power for unprivileged victims.[114] Another lesson from the federal legislators' effort is going beyond federal and state employment discrimination and civil rights law, to take advantage of the role of tort law, tax law, securities law, and corporation law in regulating and remedying sexual harassment.[115]

When a legislation is the same for all employers or all employees, form equality does not guarantee result equality, and little wiggle room is left to a court and weaker individuals for strategic brainstorming. The state legislators should be cautious about substituting their own

[112] *See* Table 2.
[113] *See* Prasad, *supra* note 8, at 2543 (arguing that anti-secrecy law rather than those new legislation banning NDAs in employment harassment and discrimination cases are the solution to achieve individual justice).
[114] *See* the discussion of the two proposed acts' potential influence on employer/harasser incentives and strategies in Subpart C, Part II of the note.
[115] *See* Deniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583 (2018) (examining the role of corporate and securities law in regulating and remedying workplace sexual misconduct; concluding that corporate and securities laws can publicize the scope and severity of sexual harassment, incentivize proactive and productive interventions by corporate fiduciaries, and punish individuals and entities that commit, conceal, and abet sexual misconduct in the workplace).

judgments for the courts' or the individuals' when enacting new laws or transplanting other states' specific approach without considering its background or other supporting mechanisms. For example, without the open records or public hazard approach in the civil procedures rules to ensure information transparency to the public, New York and Washington may not be so generous about all the settlement NDAs that the claimants agree to. The combination of general and specific approaches as well as of civil procedures and civil codes approaches adopted by New York and Washington may be a good example for other states to learn from.

The question whether silence should be bought is not a question only left to federal or state legislators. Considering the emotional harm and information asymmetry that the sexual harassment survivors are facing, alternative mechanisms from the society to address the information sharing and assistance issues among them, such as "information escrow" arrangements, also need to be developed as remedies and preventative measures.[116] In the wake of #MeToo movement, industry-lead initiatives toward creating a positive work culture also cannot be underestimated, which may be a more efficient way than legislative efforts in sending the message of "zero tolerance" with workplace sexual harassment behaviors to their work force and changing information asymmetry in the employment-related settlement areas.[117]

CONCLUSION

When a conflict of public interest and individual justice arises, there is not a uniform way to address it. As a legislative or judicial institution is preparing itself to address the NDAs in the settlements of sexual harassment and discrimination cases, it must confront with how its attitude toward the issue will inform each other as well as the employers and employees about its

[116] *See* Ian Ayres & Cait Unkovic, *Information Escrows*, 111 MICH. L. REV. 145, 145 (2012).
[117] *See* Duchicela, *supra* note 7, at 80-81(finding that Microsoft changed their sexual harassment policy "eliminating forced arbitration agreements that required employees to resolve such claims out of court—and out of public eyes").

formulations or interpretations of such issue. Nevertheless, it is important that a legal system is consistent, flexible, and dynamic balanced, which requires not only the meaningful participations of legislative, judicial, and executive agencies but also alternative mechanisms from the society. State legislators must listen to sexual harassment survivors in the state and implement a better legal system to accommodate their needs, while staying cautious when learning from other states' approaches. Preventative measures also need to be introduced to avoid future victims.